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EXAMINER PHAM, KHANH B				
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* DAVID BAGGETT, GREGORY R. GALPERIN, and  
CARL G. DEMARCKEN

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Appeal 2008-2238  
Application 09/431,366<sup>1</sup>  
Technology Center 2100

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Decided:<sup>2</sup> March 31, 2009

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*Before* HOWARD B. BLANKENSHIP, JAY P. LUCAS, and  
ST. JOHN COURTENAY III, *Administrative Patent Judges*.

LUCAS, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

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<sup>1</sup> Application filed November 1, 1999. The real party in interest is ITA Software, Inc.

<sup>2</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

Appellants, on November 25, 2008, requested Reconsideration of the Decision on Appeal dated September 26, 2008 on the belief that the Board misapprehended or overlooked certain points in rendering its decision.

### DECISION OF THE BOARD

The Board of Appeals, in the Decision of September 26, 2008, decided as follows:

- R1: The rejection of claims 1 to 18 and 30 to 32 under 35 U.S.C. § 101 for being directed to non-statutory subject matter is reversed.
- R2: The rejection of claims 3 and 4 under 35 U.S.C. § 112 (1) for failing to comply with the enablement requirement is reversed.
- R3: The rejection of claims 1, 5, 19, and 23 under 35 U.S.C. § 102(e) for being anticipated by Lynch is affirmed.
- R4: The rejection of claims 23 and 30 under 35 U.S.C. § 102(e) for being anticipated by Walker is affirmed.
- R5: The rejection of claims 1 to 3, 5 to 21, and 23 to 32 under 35 U.S.C. § 103(a) for being obvious over Mehovic in view of Filepp is affirmed.
- R6: The rejection of claims 4 and 22 stand rejected under 35 U.S.C. § 103(a) for being obvious over Mehovic, Filepp, and Khosravi-Sichani (Khosravi) is affirmed.

Opinion 24.

## RESPONSE

Appellants contend that the Board improperly applied the “‘intended use’ doctrine when characterizing the feature of claim 19.” (Req. Reh’g 2, bottom). In the Opinion, at page 15, the Board stated:

With regard to claim 19, we agree with the Examiner that the argued “managing a cache for predicting availability information” is merely an intended use in the preamble of the claim, and cannot be given patentable weight. We thus do not find error in the rejection of this claim. See *In re Burke*[, 786 F. Supp. 1537, 1541 (C.D. Cal. 1992)].

On review of claim 19, we agree that the term “managing a cache” of the preamble is embodied in the steps delimited in the claim body that follows the preamble, and thus that aspect of the claim should not be dismissed as an intended use. The Opinion is revised to no longer rely upon the “intended use” basis for the rejection. However, the rejection R3 of claim 19 for being anticipated by Lynch is maintained for the following reasons. Lynch develops seat availability information based on a determined criterion for that seat availability information not being stale, namely the periodic updating of that information. (Col. 5, ll. 59-65). The availability of the seat is checked when the customer first inquires about the availability of the price, and then again when he is ticketed. (Col. 1, l. 50; col. 4, l. 10). The ticketing process would secure a seat, thus seat availability is inherent. The criterion for staleness is time; and Lynch teaches periodic updating to keep the information fresh. (Col. 5, ll. 59-65).

With regard to claims 3 and 21, the Appellants further contend that patentable weight should be given to the keys recited in those claims. (Appellants incorrectly referenced claims 3 and 20; but 3 and 21 were clearly meant. Req. Reh’g 4, middle.) To clarify the Opinion, (p. 20, middle), the nature of the keys was considered non-functional as to the claimed instances of transportation, but the keys were given full weight in the analysis as items of the list which instituted queries and stored the results. Notice the use of Structure Query Language to create the queries, (Mehovic, col. 1, ll. 35-45). Notice the storage of the resultant information in the database 24 and the client 26.

Appellants’ contention that the Board misapprehended the references and the claims (especially claim 5) has been considered. Appellants argue that Lynch does not proactively populate the cache by evaluating entries according to a criterion. (Req. Reh’g 8, top). As explained above, the criterion which Lynch uses for his evaluation is the passage of time, and Lynch’s updating based on the passage of time anticipates the claim(s). With regard to claim 23, Walker queries database 245 to check the inventory of seats (¶¶ [0081]-[0082]).

#### DECISION

The Opinion dated September 26, 2008 is modified to delete the reference to the “intended use doctrine” in the section quoted above.

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Otherwise, for the reasons stated above and in the Opinion, the Decision on the claims stands.

The Request for Reconsideration is granted only to the extent of the above modification of the Opinion.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

GRANTED

msc

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